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13<sup>th</sup> June 2006

Same-Sex Inquiry

Human Rights Unit

Human Rights and Equal Opportunity Commission

GPO Box 5218

Sydney NSW 2001

Dear Human Rights Unit,

**Re: Same-Sex Inquiry**

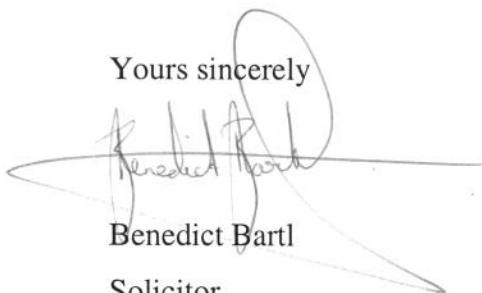
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Please find enclosed our submission to 'Same-Sex: Same Entitlements': A National Inquiry into Discrimination against People in Same-Sex Relationships Regarding Financial and Work-Related Benefits and Entitlements.

We have sought to succinctly provide a summary of discrimination that continues to exist in the Tasmanian jurisdiction as well as drawing attention to the Commonwealth arena and the discrimination that continues to be perpetrated against homosexual men in the workplace.

If we can be of any further assistance, please do not hesitate to contact us.

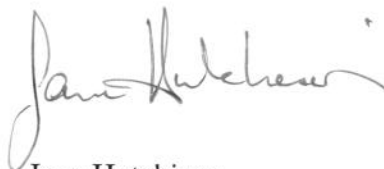
Yours sincerely



Benedict Bartl

Solicitor

Hobart Community Legal Service



Jane Hutchison

Manager

Hobart Community Legal Service

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Enc: Same Sex Inquiry Submission

## Same-Sex Discrimination in Tasmania

Arguably, Tasmania leads the nation in the removal of discrimination against same-sex couples. However, there remain important legislative amendments that remain to be made before it can rightly claim to have non-discriminatory legislation towards same-sex couples. Two pieces of legislation in Tasmania that require amendment are the *Adoption Act 1988* and the *Status of Children Act 1974*.

### - Adoption

In 2003, the Tasmanian Law Reform Institute recommended reform of the *Adoption Act 1988* (Tas)<sup>1</sup> because in the Institute's view:<sup>2</sup>

to continue to deny same sex couples eligibility to adopt is not in the best interests of children and unjustifiably and unfairly discriminates against gay and lesbian couples and their children.

Reform of the *Adoption Act 1988* (Tas) has transpired and same-sex couples are now able to adopt 'known' children.<sup>3</sup> Section 20 of the *Adoption Act 1988* (Tas) providing:

#### **20. Persons in whose favour adoption orders may be made**

(1) An order for the adoption of a child may be made in favour of two persons who, for a period of not less than 3 years before the date on which the order is made, have been married to each other or have been the parties to a significant relationship which is the subject of a deed of relationship registered under Part 2 of the *Relationships Act 2003*.

...

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<sup>1</sup> Tasmanian Law Reform Institute *Adoption by Same-Sex Couples*, Final Report No 2 2003.

<sup>2</sup> As found at <http://www.law.utas.edu.au/reform/Publications/adoption/MediaReleaseAdoptionFinRep.pdf> (Accessed 28th May 2006).

<sup>3</sup> A known child adoption is an adoption where the child is adopted by someone known to him or her, usually a stepparent, relative or carer.

(2A) The court may not make an adoption order in favour of a person who is in a significant relationship, within the meaning of the *Relationships Act 2003*, unless –

(a) the other party to the relationship is the natural or adoptive parent of the child proposed to be adopted; or

(b) either party to the relationship is a relative of the child proposed to be adopted.

...

Unfortunately, discrimination against same-sex couples continues to exist in circumstances where the couple do not have a ‘known’ relationship with the child. This anomaly is inexcusable, particularly when it is recognised that same-sex couples are able to have foster children in their care. If some same-sex couples are deemed capable of caring for foster children in circumstances where the best interests of the child are paramount, why are they then deemed unsuitable for adoption purposes? The anomaly is ridiculous and can be rectified if and when placement adoption law reform takes place.<sup>4</sup>

### **- Presumption of Parenthood**

The other important Tasmanian Statute that requires reform is the *Status of Children Act 1974* (Tas). Currently, section 10C of that Act provides:

#### **10C. Presumptions as to parenthood**

(1) Where a woman who is married or in a significant relationship, within the meaning of the *Relationships Act 2003*, with a man, with the consent of her husband or the other party to that relationship, undergoes a fertilization procedure as a result of which she becomes pregnant, the husband or other party is, for the purposes of the law of the State, to be treated as if he were the father of any child born as a result of that pregnancy.

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<sup>4</sup> Placement adoption – where the child and adoptive parents do not already know each other. This can be a local placement or an intercountry placement.

(2) Where a woman undergoes a fertilization procedure as a result of which she becomes pregnant, any man, not being her husband or her partner in a significant relationship, within the meaning of the *Relationships Act 2003*, who produced semen which was used in the fertilization procedure, shall, for the purposes of the law of the State, be treated as if he were not the father of any child born as a result of the pregnancy.

(3) Where a woman who is married or in a significant relationship, within the meaning of the *Relationships Act 2003*, undergoes a fertilization procedure as a result of which she becomes pregnant and the ovum used for the purposes of the fertilization procedure was taken from another woman, the first-mentioned woman shall, for the purposes of the law of the State, be treated as if she were the mother of any child born as a result of that pregnancy.

(4) Where a woman undergoes a fertilization procedure as a result of which she becomes pregnant, and another woman produced the ovum used for the purposes of the fertilization procedure, that other woman shall, for the purposes of the law of the State, be treated as if she were not the mother of any child born as a result of that pregnancy.

(5) In any proceedings in which the operation of subsection (1) is relevant, the consent of a husband or other party to the significant relationship to the carrying out of a fertilization procedure shall be presumed, but that presumption is rebuttable.

Again, the Tasmanian Law Reform Institute recommended legislative reform that has not yet been acted upon.<sup>5</sup> Section 10C of the *Status of Children Act 1974* (Tas) should be amended so that there is a conclusive presumption of parenthood to the same sex partner of a woman who, with her partner's consent, conceives a child as the result of an artificial fertilisation procedure.

To do otherwise is to ensure continuing discrimination against same-sex couples and their children's

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<sup>5</sup> As found at <http://www.law.utas.edu.au/reform/Publications/adoption/MediaReleaseAdoptionFinRep.pdf> (Accessed 28th May 2006).

family circumstances not being accurately reflected in law. This discrimination could have longstanding repercussions for both the child and the parents. The child is disadvantaged because, for example, the ability to provide medical care may be compromised if one parent is unable to consent because she is not legally acknowledged as a parent, and the legally recognised mother is unavailable.

### **- Blood Donation**

Any man who has engaged in sexual intercourse with another man in the preceding twelve months is denied the opportunity to donate blood. This discrimination detrimentally impacts on homosexual men as well as reinforcing stigma against all homosexual men.

For example Michael Cain who was in same-sex relationship was denied the opportunity to donate blood when he walked into the Launceston branch of the Australian Red Cross Blood Service in October 2004. When he was informed that because he had had sex with another man in the last twelve months he could not donate blood he felt as though he had been 'labelled diseased'. Subsequent to this stigmatisation, he felt 'humiliated, hurt, violated, stressed and lonely'.

These emotions would also be felt by those men who have sex with men who participate in institutional or corporate blood donation drives. The expectation, common to such drives, that everyone from the participating club, University or workplace will donate, can place men who have sex with other men, and who are not necessarily open about this sexual activity to their peers or colleagues, in a very difficult position.

They face the choice of falsely declaring their sexual status on the donor screening form or being quizzed about their self-deferral. In extreme situations, self-deferral and the suspicions it might raise, gossip it might generate or information it might unwillingly elicit, may lead to harassment or discrimination against the self-deferrer on the basis of his status or perceived status as a man who has sex with other men.

In the context of the stigma and discrimination related to the deferral of men who have sex with men as blood donors Derek Link writes:<sup>6</sup>

During a blood drive, co-workers and fellow students are rounded up and exhorted to donate...When asked, 'why didn't you donate?', awkward, embarrassing moments can ensue if people feel compelled to discuss sensitive behaviours or personal medical conditions in an insecure social setting. What male employee at an auto plant, for example, wants to say to a fellow mechanic, 'I can't give blood cause I fool around with guys'?

More broadly, all men who have sex with men suffer the detriment of discriminatory rules and requirements that disentitle them to full participation in society and the rights and obligations of equal citizenship. By adopting discriminatory policies the ARCBS is complicit in societal condemnation of men who have sex with other man as abnormal, immoral, deviant and diseased.

For example, following Michael Cain's lodgement of a complaint with both the Office of the Anti-Discrimination Commissioner in Tasmania and the Human Rights and Equal Opportunity Commission, some of the many responses published in Tasmania's three major daily newspapers<sup>7</sup> included:

*So the Red Cross made Michael Cain feel dirty. When he has sex with his boyfriend, is he suggesting that it is a clean, natural act? Gimme a break.*

- K McLelland, *The Saturday Mercury* August 6<sup>th</sup> 2005.

*Once the Red Cross opens its doors to homosexual donors, it will have opened a Pandora's box of trouble. Many homosexuals would join the queue to donate with all the inherent risks. There would be a significant exodus of blood donors who have given blood over many years. The homosexual lobby should raise millions of dollars and invest it in a government approved fund first. This could be drawn upon to compensate families who have lost a loved one to AIDS through blood contamination.*

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<sup>6</sup> Link, D., "Should gay men be allowed to donate blood?" in "The Body: GMHC treatment issues, Nov 2000 as found at <http://www.thebody.com/gmhc/issues/novdec00/blood.html> (Accessed 25th August 2005).

<sup>7</sup> *The Mercury* (Hobart based), *The Examiner* (Launceston based) and *The Advocate* (North-West based).

- E Salmon, *The Advocate* November 17<sup>th</sup> 2005.

*Perhaps a quiet read of Bryce Courtney's book April Fool's Day would also help bring into context the reason why some members of the community are just not able to donate blood because of their health, where they have lived or visited or their lifestyle choice.*

- D Lanerak, *The Examiner* August 6<sup>th</sup> 2005.

*Surveys have shown that in some places 70 percent of homosexuals do not use condoms even when many know that they have HIV.*

- N Newitt, *The Advocate* November 7<sup>th</sup> 2005.

*Syphilis has reached epidemic proportions in the gay community in both Sydney and Melbourne and scientists say it is only a matter of time before urban gay communities throughout Australia are affected. Just another reason why blood donations from homosexuals should be banned in the interests of public safety.*

- J Hill, *The Mercury* August 17<sup>th</sup> 2005.

*I do not get petulant or angry as Michael Cain has, nor should he be unreasonable. He has chosen a lifestyle and that has great and serious consequences. He must accept that.*

- E Salmon, *The Advocate* October 13<sup>th</sup> 2005.

*The next phase of his crusade will put to good use the wads of spare cash the Red Cross obviously has lying around. I mean to say, the Red Cross must be so well-funded, equipment so state-of-the-art the only thing left to do with the money is to defend itself against selfish, narrow-minded, egocentric individuals who feel discriminated against.*

- N Peterson, *The Mercury* October 4<sup>th</sup> 2005.

*Well Mr Cain, it makes my blood boil also that I am subjected to the rantings of homosexuals who continually think they are discriminated against... When is Mr Cain going to apprehend that his sexual preference is deemed to be high risk and just accept it.*

- S Halls, *The Mercury* August 5<sup>th</sup> 2005.

*The Red Cross is obviously very aware of the higher risk and the chances of people who have engaged in homosexual activities carrying transmittable diseases due to their sexual practices and lifestyles. Mr Cain says that he feels angry, very dirty and useless. Although he chooses his path and partners in life, he should be able to comprehend that homosexual activity is generally not accepted as a morally normal practice. The large majority in society deems such activities as immoral and abnormal. Those who are engaged in it are projecting homosexual activity as being both normal and moral. But they cannot expect others to just agree with them and not be cautious with their practices and disease risk, as we see the Red Cross have chosen to do. There is a higher risk factor with homosexual lifestyles.... However, AIDS is but one of the many diseases linked to homosexual behaviours. Australians treat homosexuals equally, but in saying that people are not totally accepting of the practices nor choices that these people have made. The consequences of such choices, which carry higher disease factors, is that some precautions will and must be taken by the public to ensure others are safe.*

*- C Herd, The Mercury August 6<sup>th</sup> 2005.*

The unfair stereotyping and stigmatisation of men who have sex with other men as threatening, irresponsible and diseased is common. So is discrimination based on these stereotypes and this stigma. According to a wide range of local and national research, this discrimination leads to and includes increased risk of being verbally abused and physically assaulted; increased risk of suicide; conflict with parents and peers; and loss of educational and employment opportunities; and increased drug and alcohol abuse.

Few of the other classes of people deferred from blood donation are as vulnerable as men who have sex with men to being unfairly stereotyped. Few experience discrimination on the basis of that class status in areas other than blood donation. It's arguable that none experience stigmatisation or discrimination to a greater degree than men who have sex with other men.

As well as the stigma experienced by men who have sex with men being exacerbated and underlined by current ARCBS donor policy, there are disadvantages experienced by everyone who is excluded from blood donation.



A recently completed study which investigated participants perceptions on blood donation stated:<sup>8</sup>

Donating blood is imagined to be an act of greater charity than the donation of money or other goods or services (apart from organs). Particular meanings are associated with this act—‘giving a little bit of yourself’. The significance attributed to blood donation constructs the donor as the ‘good citizen’ — altruistic, morally superior. By extension, those excluded from blood donation cannot get access to this particular identity category.

The ARCBS Donor Declaration proclaims “Welcome to a special, select group of people who care”. For those identifiable categories of people who are deferred from blood donation the obvious implication is that they are not welcomed; they are not special and that they do not care.

### **Summary**

If all forms of discrimination against same-sex couples are to be removed, it is important that same-sex couples are given the opportunity to adopt any child and that the presumption of parenthood is amended to allow for the subtleties of many relationships. It is also essential that the Australian Red Cross Blood Service be required to adopt world’s best practice blood donation guidelines and ensure that all potential donors –of whatever sexuality- are offered the opportunity to donate blood without the detriment and stigma that continues to attach to homosexual men being barred. Until all of these reforms are implemented, stigma will continue to attach to same-sex couples.

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<sup>8</sup> K Valentine, “Citizenship, Identity, Blood Donation” As found in C Treloar, S Fraser, S Kippax, M Rosengarten, C Waldby & K Valentine, “Blood Awareness in Hepatitis C Prevention” National Centre in HIV Social Research. As found at <http://nchsr.arts.unsw.edu.au/pdf%20reports/bloodawareness.pdf> (Accessed 19th January 2006).